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(“Am. Verified Complaint”), a Motion for Temporary Restraining Order, and Motion for Expedited Discovery on August 21, 2007. POET has asked the Court for an expedited hearing on both motions, and they are currently pending before the Court. On August 23, POET filed a Motion for Preliminary Injunction. POET asks that the Court grant its Motion for Temporary Restraining Order and Motion for Expedited Discovery, and set a hearing on its application for a preliminary injunction after the expedited discovery has been completed and while the TRO is still in place.

B. POET

POET Research, Inc., f/k/a Broin and Associates, Inc., is a South Dakota corporation with its principal place of business in Sioux Falls, South Dakota. (Am. Verified Complaint ¶ 1.) POET Research owns ethanol-production technology and licenses its technology to ethanol facilities that are constructed by POET Design and Construction and operated by POET Plant Management. (*Id.*) Poet Research’s ethanol-production technology is proprietary, highly confidential, and extremely valuable. (*Id.*)

POET Design and Construction, Inc., f/k/a Broin Research, Inc., is a South Dakota corporation with its principal place of business in Sioux Falls, South Dakota. (Am. Verified Complaint ¶ 2.) POET Design and Construction designs, engineers, and constructs technologically-advanced ethanol-production facilities that convert corn to ethanol. (*Id.*) POET Design and Construction has designed, engineered, and constructed more than 25 ethanol plants, all of which employ Poet Research’s technology. (*Id.*)

POET Plant Management, LLC, f/k/a Broin Management, LLC, is a Minnesota

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limited liability company with its principal place of business in Sioux Falls, South Dakota. (Am. Verified Complaint ¶ 3.) POET Plant Management operates and manages 20 ethanol plants, all of which were designed and constructed by POET Design and Construction, Inc. (*Id.*) The company's management techniques and practices are proprietary, highly confidential, and extremely successful. (*Id.*)

Each of the ethanol plants constructed and operated by POET is owned by a separate, independent entity. (Am. Verified Complaint ¶ 4.) The owner signs a licensing agreement with POET Research to use its ethanol-production technology and a design-build agreement with POET Design and Construction to design, engineer, and construct the plant, using POET Research's licensed technology. (*Id.*) In conjunction with signing the licensing and design-build agreements, the owner signs a management agreement with POET Plant Management to operate the plant. (*Id.*) Pursuant to the management agreement, POET Plant Management provides a General Manager to the plant. (*Id.*) The General Manager is employed by POET Plant Management, reports to supervisors in Sioux Falls, and is directed from Sioux Falls. (*Id.*) POET's technology, business model, and organizational structure are unique within the ethanol industry. (*Id.*)

C. Simpson

Simpson began his employment with POET on November 6, 1998, when he was hired as General Manager of POET's ethanol plant located near Albert Lea, Minnesota. (Am. Verified Complaint ¶ 5.) In March 2002, Simpson took over as the General Manager of POET's ethanol plant located in Caro, Michigan. (*Id.*) Prior to being hired

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by POET, Simpson had no experience in the ethanol industry. (*Id.* ¶ 12, Ex. 4.)

As the General Manager of both the Albert Lea and Caro facilities, Simpson was the highest ranking POET employee at each respective facility. (Am. Verified Complaint ¶ 13.) His responsibilities included overseeing “all business operations, plant operations, purchasing operations, marketing operations, personnel operations, and any and all other items relating to plant operations and profitability.” (*Id.*, Ex. 5.) He supervised all plant employees and reported regularly to POET management on sensitive information regarding plant finances and operations. (*Id.*) As a General Manager, Simpson necessarily had intimate and extensive knowledge of POET’s proprietary and confidential ethanol-production technology and management practices and techniques. (*Id.* ¶ 13.)

1. Simpson’s Contractual Obligations

When Simpson was hired as General Manager of the Albert Lea facility on November 6, 1998, he signed an employment agreement (“Albert Lea Employment Agreement”). (Am. Verified Complaint ¶ 9, Ex. 1.) This agreement had a confidentiality clause which precluded Simpson from disclosing trade secrets and other confidential information to third parties. (*Id.* Ex. 1 at § 5.2.) The agreement also included a non-compete provision:

The Employee shall not, during his or her employment with Employer and for a period of three (3) years after the termination of this Agreement, directly or indirectly, engage in the same or a similar business to that of the Employer within the United States of America. Without limiting any other remedies available to the Employer to enforce this Article, the Employee

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agrees that an injunction or other equitable relief shall be available without the necessity of the Employer posting a bond.

(*Id.* Ex. 1 at § 5.3.)

When Simpson became the General Manager of POET's ethanol facility in Caro, Michigan, he signed a second employment agreement ("Caro Employment Agreement"). (*Id.* ¶ 10. Ex. 2.) As was the case with the Albert Lea Employment Agreement, this agreement included a non-compete provision stating that he would not "during the term of this Agreement and within a period of three years after leaving the employment of Employer [POET], engage, directly or indirectly, in the same or a similar business to that of the Employer within the United States of America." (*Id.* Ex. 2 at § 4.3.) The Caro Employment Agreement also included a provision regarding confidential information prohibiting Simpson from disclosing any of POET's confidential information to any third party either for his own benefit or the benefit of others. (*Id.* Ex. 2 at § 4.2.) The Caro Employment Agreement provides that "[t]he Employee further acknowledges that if employment with the Employer terminates for any reason, the Employee can earn a livelihood without violating the foregoing restrictions and that the Employee's ability to earn a livelihood without violating these restrictions is a material employment condition." (*Id.* Ex. 2 at § 4.4.) Significantly, the Employment Agreement specifically provides that POET is entitled to seek injunctive relief to protect its business and goodwill and to enforce the contract:

The Employee acknowledges that compliance with these restrictions is necessary to protect the Employer's business and goodwill and that a

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breach shall irreparably and continually damage the Employer, for which money damages may not be adequate. **Consequently, if the Employee breaches or threatens to breach any of these covenants, the Employer shall be entitled to a preliminary or permanent injunction to prevent the continuation of this harm and money damages.** Money damages shall include the Employers right to recover fees, compensation, or other remuneration earned by the Employee as a result of any breach. Nothing in this Agreement shall be construed to prohibit the Employer from also pursuing any other remedy.

(*Id.* at Ex. 2 at § 4.5 (emphasis added).)

In addition to the covenants contained within the Employment Agreements, Simpson signed a nondisclosure agreement (“NDA”) with POET on November 11, 2006. (Am. Verified Complaint ¶ 11, Ex. 3.) Pursuant to the NDA, Simpson agreed not to publish, disseminate, disclose, or use in any way POET’s confidential information. (*Id.* ¶11, Ex. 3 at § 2.2.)

2. Simpson’s Departure and Employment with Ethanex

On Monday July 16, 2007, Simpson submitted a written letter of resignation from his position with POET. (Am. Verified Complaint ¶ 14, Ex. 6.) On July 19, POET accepted Simpson’s resignation effective that day. (*Id.* ¶ 15, Ex. 7.) At that time, Poet reminded Simpson of his contractual obligations regarding confidentiality and non-competition:

I remind you that you are contractually obligated not to solicit any employees of Poet for the next two years; required to return immediately all Poet property and confidential information; prohibited from using or disclosing any confidential or proprietary information of Poet; and barred for a period of three years from working in the ethanol industry. As you

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probably know, Poet has been aggressive in enforcing its covenants not to compete and protecting the confidentiality of its information.

(Id.)

Despite his contractual obligations to POET, on July 23, 2007, one business day after Simpson had left POET, it was announced that he had been appointed Vice President of Operations for Ethanex. (Am. Verified Complaint ¶ 16, Ex. 8.) According to Ethanex's press release, Simpson "will be responsible for the overall operations of Ethanex Energy's planned ethanol production facilities." *(Id.)* "In addition, Mr. Simpson will lead the plant organizational structuring, environmental compliance and community relations." *(Id.)* This press release notes that as a result of his employment with POET, Simpson has significant experience in ethanol production and management:

Mr. Simpson was employed by POET Plant Management for the past nine years as a General manager of plant operations. Most recently he managed POET Biorefining – Caro (formerly Michigan Ethanol, LLC). During his five year tenure Mr. Simpson was responsible for initial staffing and start-up as well as full operational and P&L responsibility. Mr. Simpson's plant Organizational Structure became the standard for all subsequent Poet facilities.

Prior to the Caro facility, Mr. Simpson was General Manager of Agra Resources Coop (EXOL), a POET Managed dry mill ethanol plant in Albert Lea, MN. Mr. Simpson successfully expanded the plant's production capacity by nearly threefold and successfully operated the facility at over 150% of design capacity.

(Id.)

As is further noted in the press release, Ethanex "is a renewable energy company whose mission is to be the lowest cost producer of renewable energy by employing

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advanced technology in design, construction and operation of ethanol plants.” (*Id.*)

Ethanex “is currently developing two ethanol production facilities located in the mid-west, with a combined production capacity of approximately 264 million gallons of ethanol per year.” (*Id.*)

When POET served the Summons upon Simpson on July 26, it also delivered correspondence to him. (Am. Verified Complaint ¶ 20, Ex. 9.) The letter set forth Simpson’s contractual obligations, advised him that his announced employment with Ethanex was in violation of his covenant not to compete, and asked him to resign from his employment with Ethanex. POET also sent correspondence to Ethanex informing it of Simpson’s contractual commitments and this litigation. (*Id.*) POET did not receive any substantive response from Simpson or Ethanex until Simpson removed this action and filed a motion to dismiss for lack of service on August 17. Since the removal, POET has learned that Simpson began working for Ethanex on July 30, 2007.

II. THE *DATAPHASE* FACTORS WEIGH IN FAVOR OF POET’S REQUESTED PRELIMINARY INJUNCTION.

When considering whether to grant a preliminary injunction, this Court considers the four *Dataphase* factors: (1) the movant’s probability of success on the merits; (2) the threat of irreparable harm to the movant absent the injunction; (3) the balance of this harm and any injury that the injunction would inflict on other parties; and (4) the public interest. *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). As is set forth in detail below, the *Dataphase* factors favor entry of a preliminary injunction

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enjoining Simpson from working for Ethanex and from using or disclosing any of POET's confidential information or trade secrets to Ethanex, pending final resolution of this action.

A. POET Will Prevail on the Merits.

For the purposes of a preliminary injunction, "likelihood of success on the merits" requires only that the "movant find support for its position in governing law." *See, e.g., Curtis 1000, Inc. v. Youngblade*, 878 F.Supp. 1224, 1250 (N.D. Iowa 1995). In the Amended Verified Complaint, POET has alleged a number of substantive causes of action against Simpson. In Count 1, POET alleges that Simpson has breached and continues to breach the covenant not to compete in his Caro Employment Agreement by working for Ethanex. In Count 2, POET alleges that Simpson has breached and/or will breach his NDA by using and disclosing POET's confidential information during the course of his employment with Ethanex. In Count 3, POET alleges that Simpson has misappropriated and/or will misappropriate POET's trade secrets by disclosing and using them in conjunction with his employment at Ethanex. All of POET's claims are supported by the governing law and the factual record.

1. Simpson is violating his covenant not to compete.

Simpson is subject to a valid covenant not to compete. Simpson signed a covenant not to compete against POET both when he was first hired as the general manager of POET's Albert Lea plant and when he transferred to be the General Manager of the Caro facility. (Am. Verified Complaint ¶ 9, Ex. 1 and ¶ 10, Ex. 2.) In signing the Caro

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Employment Agreement, which is the agreement in effect at the time of his resignation, Simpson agreed that he would not “during the term of this Agreement and within a period of three years after leaving the employment of Employer [POET], engage, directly or indirectly, in the same or a similar business to that of the Employer within the United States of America.” (*Id.* Ex. 2 at § 4.3.). The Caro Employment Agreement is governed by South Dakota law. (*Id.*, ¶ 10, Ex. 2 at §7.)

Covenants not to compete are enforceable under South Dakota law. SDCL § 53-9-11 provides:

An employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, first or second class municipality, or other specified area for a period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business.

Under South Dakota law, when an employee voluntarily quits his job, as Simpson did, his non-compete clause is enforced as long as it meets the statutory requirements of SDCL § 53-9-11. *Central Monitoring Services, Inc. v. Zakinski*, 553 N.W. 2d 513, 519 (S.D. 1996).

The covenant not to compete in the Caro Employment Agreement complies with the statutory requirements of SDCL § 53-9-11, with the exception of the of the covenant’s three-year duration, which is one year more than allowed by South Dakota law. The three-year period does not invalidate the entire covenant, however, for South

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Dakota has adopted a partial enforcement doctrine, whereby an overly broad non-compete provision is modified to comply with statutory requirements. *Franklin v. Forever Venture, Inc.*, 696 N.W.2d, 545, 551 (S.D. 2005). Pursuant to this doctrine, the South Dakota Supreme Court has routinely modified non-competition agreements to conform with the statutory mandates. *St. Onge Livestock Co., Ltd. v. Curtis*, 650 N.W.2d 537, 540 (S.D. 2002) (court amended and modified terms of non-compete agreement to comport with statute); *Simpson v. C & R Supply, Inc.* 598 N.W.2d 914, 920 (S.D. 1999) (modifying noncompetition provision to comport with statute by reducing boundaries); *Ward v. Midcom, Inc.*, 575 N.W.2d 233, 238 (S.D. 1998) (modifying noncompetition agreement to make it enforceable in the county in which employer was located); *Loescher v. Policky*, 173 N.W.2d 50, 55 (S.D. 1969) (modifying noncompetition agreement to limit its operation to twenty-five mile radius of defendant's veterinary practice). In this case, POET seeks to enforce Simpson's non-compete agreement only for the statutory permitted period of two years. (Am. Verified Complaint ¶¶ 75 - 78.)

Simpson is in violation of his covenant not to compete. The modified covenant precludes Simpson from working in the same business as POET within the United States for a period of two years from the termination of his employment. POET is in the business of constructing and operating ethanol-production plants, and Ethanex is in the business of constructing and operating ethanol-production plants, (Am. Verified Complaint ¶¶ 2, 3 and 17, Ex. 8). Simpson operated ethanol plants for POET, and Simpson will operate ethanol plants for Ethanex, (*Id.* ¶ 18). Because Simpson is working

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for an employer within the United States who is engaged in the same business as POET, Simpson is violating his covenant not to compete.

POET has established that it is likely to prevail on its claim that Simpson's covenant not to compete precludes him for working for Ethanex for a period of two years. This factor therefore weighs in favor of POET's requested preliminary injunction.

2. Simpson will violate his contractual and statutory obligations to preserve and protect POET's confidential information and trade secrets if he works for Ethanex.

- a. Simpson has an obligation to protect and preserve POET's confidential information and trade secrets.

As discussed above, the Caro Employment Agreement prohibits Simpson from disclosing confidential information learned while working for POET, and provides that POET is entitled to injunctive relief against Simpson if he breaches or threatens to breach this obligation, (Am. Verified Complaint Ex. 2 at §§ 4.2 and 4.5.) Likewise, the NDA signed by Simpson prohibits Simpson from publishing, disseminating, disclosing, or using in any way POET's confidential information. (*Id.* Ex. 3 at § 2.2.)¹ The NDA

¹The NDA broadly defines "confidential information as "any and all information disclosed by Broin [POET] to Recipient relating to is business or technology that Broin [POET] designates as being confidential or which, under the circumstances surrounding disclosure, should be treated as confidential, regardless of whether Broin [POET] provides such information to Recipient in tangible and/or intangible form even if it is retained in the tangible or intangible memory of Recipient. Confidential Information includes for example and without limitation: Broin's [POET's] confidential business or technical information(s), such as financial information(s), data, marketing technique(s) and material(s), business plan(s) and strategies, business operations (s) and system(s), pricing policies, information concerning employee(s), customer(s), and/or vendor(s), investor(s), intellectual property, trade secret(s), idea(s), concept(s), discoveries,

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further provides that if Simpson breaches or threatens to breach the NDA, POET is entitled to injunctive relief to restrain the breach or threatened breach. (*Id.* Ex. 3 at § 7.8.)

In addition to having contractual obligations to protect POET's confidential information, South Dakota law requires Simpson to protect POET's trade secrets under its version of the Uniform Trade Secrets Act ("UTSA"). SDCL §§ 37-29-1 to 37-29-11.

The UTSA defines a trade secret as follows:

Information, including a formula, pattern, compilation, program, device, method, technique, or process, that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

SDCL § 37-29-1(4). Under the UTSA, the owner of a trade secret may petition the court for injunctive relief for actual or threatened misappropriation. SDCL § 37-29-2. The UTSA defines "misappropriation" of a trade secret as follows:

- (I) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (ii) Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (A) Used improper means to acquire knowledge of the trade secret; or
 - (B) At the time of disclosure or use, knew or had reason to know that such knowledge of the trade secret was : (I) Derived from or through a person

invention(s), improvement(s), research, development(s), product(s), composition(s), prototype(s), biological or physical material(s), manufacturing, and manufacturing process(es), except for such information described in paragraph 4.0."

(*Id.* Ex. 3 at § 1.1.)

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who had utilized improper means to acquire it; (II) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (III) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use: or (C) Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

SDCL § 37-29-1(2).

- b. Simpson possesses POET's confidential information and trade secrets.

Simpson possesses substantial information that constitutes confidential information pursuant to his Caro Employment Agreement and the NDA and trade secrets as defined by the UTSA. The confidential information and trade secrets known by Simpson include, but are not limited to, the following areas:

POET Production/Operations

1. BPX – flow from beginning to DDG production;
2. Enzymes – particular enzymes used, blend rates, usage, activity;
3. Corn Grinding – flour fines, grinding systems, hammer mill developments;
4. Infection control;
5. High gravity fermentation;
6. Water balance;
7. Zero discharge;
8. Standard Operating Procedures;
9. Process drawings – red lines, as built;
10. Temperature staging;
11. Yeast and ingredients – portions, timing, temperatures, pH levels;
12. Ring dryers – specific flow parameters and temperatures;
13. Heat/Mass balance between evaporators/distillation/sieves;
14. Overall energy conservation and usage;
15. Ethanol production and percentages achieved; and
16. Process controls (DCS) – programming, PI.

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POET Financial and Marketing Information

1. Profit and loss data, balance sheet information, income statements, cash flow information;
2. POET Board activity and strategies;
3. POET Ethanol Products – marketing strategies, sales data, customer lists;
4. POET Nutrition – marketing strategies, sales data, customer lists;
5. Yield and efficiency data;
6. Operations recap data – not only for Caro plant, but company wide because of attendance at quarterly review meetings;
7. Capital units transfer system, capital unit's value;
8. Internal projects – IRR, NPV, strategy;
9. Strategic Plans, scorecards, other internal performance measurement tools;
10. Banking covenants and loan agreements; and
11. Internal programs (PSM, EAP, Safety, EH&S, etc.).

POET Risk Management Programs and Practices

1. Corn risk programs;
2. Specialty programs;
3. Natural gas risk programs; and
4. Corn procurement strategy – DTN, email, POET Risk internal correspondence.

POET Research and Development

1. Exposure to internal documentation;
2. Liberty; and
3. Bell.

POET Quality Control Protocols

1. Testing protocols;
2. Standards for ethanol and feed products;
3. Standard Operating Procedures; and
4. Process trials and research.

(Am. Verified Complaint ¶ 30.) All of the above-listed information meets the definition of confidential information under the Caro Employment Agreement and the NDA and constitutes trade secrets under the UTSA. POET derives economic value from this information because it is unknown to, and not readily ascertainable by, others in the

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ethanol industry. (*Id.* ¶ 31.) Ethanol plants that are designed, constructed, and operated by POET consistently achieve greater ethanol yields and higher profit margins than their competition. (*Id.*) As a result, companies and their investors who want to build and own an ethanol plant are willing to pay substantial sums of money to license POET's technology, to hire POET to design and build the ethanol plant, and to manage the plant. (*Id.*) If POET's confidential information and trade secrets were to become known to others in the industry, the value of POET's proprietary information would be lost.

POET has taken significant precautions to maintain the secrecy of its information. (Am. Verified Complaint ¶ 32.) When POET enters into a relationship with a new ethanol facility, the facility is required to sign a confidentiality and nondisclosure agreement. (*Id.*) The management agreement between the plant and POET also contains confidentiality provisions. (*Id.*) Because of those confidentiality provisions, employees working in POET ethanol plants sign confidentiality agreements and covenants not to compete. (*Id.*) In addition, POET's consultants and vendors are required to sign confidentiality and nondisclosure agreements. (*Id.*) Furthermore, POET plants, including the Caro, Michigan facility where Simpson was last employed, can be accessed by authorized visitors only through the main entrance. (*Id.*) Visitors are required to check in with the receptionist and sign a visitor's book. (*Id.*) Visitors are then escorted by a plant employee while in the building. (*Id.*) Moreover, POET maintains a secure computer system. (*Id.*) Consequently, POET's confidential information meets the legal and factual requirements for a trade secret under South Dakota law.

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c. POET is entitled to injunctive relief to protect its confidential information and trade secrets.

To be entitled to injunctive relief, POET does not need to establish actual disclosure or use of its confidential information and trade secrets. In signing the Caro Employment Agreement and the NDA, Simpson acknowledged and agreed that POET is entitled to injunctive relief from actual or *threatened* disclosure of confidential information. Similarly, the UTSA authorizes injunctive relief for actual or *threatened* misappropriation of a trade secret. SDCL § 37-29-2. Simply put, to be entitled to injunctive relief, POET need not show that Simpson has already improperly used or disclosed POET's information; instead, POET need only show that Simpson's employment with Ethanex represents a threat of disclosure or use of POET confidential information and trade secrets.

Simpson cannot work for Ethanex as its Vice President of Operations without using and disclosing confidential information and trades secrets learned during his nine years of employment with POET. All of his expertise and knowledge regarding ethanol production and ethanol plant management was acquired during his tenure at POET. Simpson cannot possibly oversee the operations of multiple ethanol plants without using and disclosing confidential information acquired from POET. Ethanex's own press release indicates that Simpson acquired and implemented valuable knowledge while employed by POET. Because Simpson's employment with Ethanex represents a real and substantial threat of disclosure and use of POET's confidential information and trade secrets, POET is entitled

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to an injunction enjoining Simpson from working for Ethanex or otherwise disclosing or using POET's confidential information and trade secrets.

An employee who possesses a company's sensitive information is properly enjoined from working for a direct competitor when he will inevitably draw upon and use his previous employer's confidential information. For example, in *PepsiCo, Inc. v. Redmond*, the Seventh Circuit followed the inevitable disclosure doctrine and held that a managerial employee of a soft drink manufacturer would inevitably disclose trade secrets to a competitor if he accepted employment with that competitor. 54 F.3d 1262, 1271 (7th Cir. 1995). As the court noted, "PepsiCo finds itself in the position of a coach, one of whose players has left, playbook in hand, to join the opposing team before the big game." *Id.* at 1270. The court concluded that even without an actual showing that Redmond would use PepsiCo's trade secrets in his new position with a direct competitor, the fact that Redmond possessed high-level confidential information regarding PepsiCo's marketing and financial plans for its products would make it impossible for him to compartmentalize that knowledge and not incorporate it into his job with PepsiCo's competitor. *Id.* at 1269. Because the Seventh Circuit found that Redmond would inevitably disclose trade secrets to PepsiCo's competitor if he were allowed to accept an employment offer with that competitor, the court upheld the trial court's issuance of injunctive relief precluding Redmond from going to work for the competitor. *Id.* at 1272.

The facts in this case are similar to those in *PepsiCo*, in that Simpson possesses significant confidential information about POET's unique ethanol-production technology;

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its production techniques, practices, and results; its risk management and procurement programs and strategies; its past and current research and development; its marketing strategies and data; and its financial performance. Simpson is now going to work for a new employer who is in the same business as POET and will be performing the same basic functions that he performed while at POET. Simpson's position with Ethanex is a managerial position where he will be involved in all levels of Ethanex's operation of its ethanol plants. Because all of Simpson's knowledge regarding operating ethanol plants was gained solely through his employment at POET, he cannot perform his job at Ethanex without inevitably relying upon, using, and disclosing confidential information he received from POET. Therefore, as was the case in *PepsiCo*, POET is entitled to injunctive relief prohibiting its former employee from working for a competitor.

In determining whether to grant preliminary injunctive relief in cases like this one, courts in other jurisdictions have also examined whether the employee will likely disclose his former employer's trade secrets. *See, Dexas Digital Storage, Inc. v. Haenszel*, 832 N.E.2d 62, 68-69 (Ohio App. 2005) (Injunctive relief granted based upon inevitable disclosure of trade secrets.); *Procter & Gamble Co. v. Stoneham*, 747 N.E.2d 268, 274 (Ohio 2000) (Injunctive relief granted based upon inevitable disclosure of trade secrets.); *Cardinal Freight Carriers, Inc. v. J.B. Hunt Transport Services, Inc.*, 987 S.W.2d 642, 646 (Ark. 1999) (Injunctive relief granted because of inevitable disclosure of trade secrets); *National Starch & Chemical Corp. v. Parker Chemical Corp.* 530 A.2d 31, 33

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(N.J. 1987) (Injunctive relief upheld because of inevitable disclosure of chemical trade secrets.).

POET has shown that it will likely prevail on its claim that Simpson possesses confidential information and trade secrets of POET; that he has contractual and statutory obligations to not disclose or use this information; and that Simpson cannot perform his work at Ethanex without using or disclosing POET's protected information. This factor again weighs in favor of granting the requested injunction.

B. If the Injunction is not Granted, POET Will Likely Incur Irreparable Injury.

In this case, an injunction precluding Simpson from working for Ethanex should be granted to protect POET's immediate interests. When Simpson signed the Caro Employment Agreement, he specifically acknowledged and agreed that a breach of the covenant not to compete would irreparably and continually damage POET, and that if he breached or threatened to breach the covenant, POET was entitled to injunctive relief to prevent the continuation of the harm. (Am. Verified Complaint. Ex. 2, § 4.3.) Because Simpson has agreed that a breach of the covenant not to compete would irreparably damage POET and that POET is entitled to injunctive relief to prevent such harm, POET need not make an actual showing of irreparable harm. *See Curtis 1000*, 878 F.Supp. at 1250. (noting that there is legal authority for entering injunctive relief based upon a party's contractual stipulation that breach of an agreement entitles the other party to an injunction).

In addition to Simpson's contractual concessions, the record demonstrates that if he is allowed to work for Ethanex, POET will in fact suffer irreparable harm. The ethanol

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industry is highly competitive and growing rapidly, as is evidenced by the development of new start-up companies such as Ethanex, which plans to have two new facilities with a combined annual production of more than a quarter of a million gallons of ethanol. (Am. Verified Complaint ¶ 21.) POET, which was originally founded in 1987, is a pioneer and leader in the ethanol industry. (*Id.* ¶ 22.) POET and the plants that employ POET technology, techniques, and management practices consistently outperform their competitors in production, performance, and profit margins. (*Id.*) Through its extensive research and development, cutting-edge technology, and unique organizational structure and management practices, POET has developed a business model that is the standard to which its competitors strive to meet. ((*Id.*) POET employees are some of the most skilled and knowledgeable in the industry, and their POET experience is highly sought after by the ethanol industry. (*Id.* ¶ 23.) POET's technology and management techniques constitute confidential information and trade secrets, and POET does not want Ethanex or others in the ethanol industry to learn the details of its technology, production processes, and operational methods. (*Id.* ¶ 24.) It is for those reasons that POET and its plants require employees to sign non-compete and nondisclosure agreements. (*Id.* ¶ 25.)

Simpson possesses confidential information and trade secrets that POET does not want revealed to Ethanex and other competitors. (Am. Verified Complaint ¶ 26.) Simpson has worked for POET as a General Manager for nine years and in that time had access to and has obtained volumes of confidential information that POET employs to successfully design, construct, and manage a profitable ethanol plant. (*Id.* ¶ 27.) As a General Manager,

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Simpson had access to POET's unique technology; its production and operational information and techniques; its risk management programs and practices; its on-going, state-of-the-art research and development; its quality control protocols and standards; and its strategic, business, and financial information. (*Id.*)

Simpson not only had access to information related to the plants that he directly managed, but through meetings, telephone conferences, training, and internal company communications, Simpson had access to the operational data for other plants in the organization. (Am. Verified Complaint ¶ 28.) Simpson was involved in regular teleconference meetings with other POET general managers and corporate officers, where highly-sensitive information was shared regarding other POET plants and long-term company planning. (*Id.*)

In sum, Simpson possesses the confidential information and trade secrets used by POET to consistently produce the industry's highest percentages of ethanol and to operate the most profitable plants in the industry. (*Id.* ¶ 29.) As discussed above, if Simpson is permitted to work for Ethanex, he will inevitably use and disclose POET's confidential information and trade secrets. Simpson is taking nine years of POET knowledge, including highly-confidential technology, information, and data, and is essentially handing it over to a competitor who has a stated desire to become a technological leader in the ethanol industry. If Simpson is allowed to use or disclose POET's confidential information to Ethanex, POET will suffer irreparable harm to its business, and the confidentiality of its proprietary information and trade secrets will be forever lost.

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Because POET faces a real and significant threat of irreparable harm if Simpson is allowed to work for Ethanex as head of its operations, this factor weighs in favor of a preliminary injunction.

C. Simpson Will not be Substantially Harmed if the Injunction is Issued.

While POET will be irreparably harmed if Simpson is allowed to use and disclose POET's confidential information and trade secrets, Simpson will not suffer any irreparable harm if the injunction is issued. POET is simply asking this Court to issue a preliminary injunction enforcing Simpson's covenant not to compete and his confidentiality obligations until this matter is finally resolved. When he signed his Caro Employment Agreement and accepted the financial benefits of the contact, Simpson agreed that when he left the employ of POET, he would not work for an employer in the same business as POET. Simpson further agreed that if he did accept employment in violation of his covenant not to compete, POET was entitled to preliminary injunctive relief enjoining him from doing so. If the Court ultimately determines that Simpson's covenant not to compete does not prevent him from working for Ethanex, his only potential injury is a temporary a loss of wages. Although POET suspects that Ethanex will continue to pay Simpson even if the injunction is entered, POET is willing to deposit appropriate security with the Court to cover any potential legal damages Simpson may incur as a result of the injunction. Because the potential harm to POET is substantial and irreparable, and any potential harm to Simpson is relatively minimal and easily remedied with an award of damages, this factor weighs in favor of the injunction.

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D. The Public's Interest Favors Enforcing Simpson's Contractual Obligations.

Issuance of the preliminary injunction is in the public interest. Through the enactment of SDCL § 53-9-11, the South Dakota legislature has recognized the validity and enforceability of covenants not to compete signed between employers and employees. As noted above, the South Dakota Supreme Court has regularly enforced covenants not to compete, even when they are overly broad by conforming them to comply with statutory mandates. POET wishes to enforce the covenant not to compete only to the extent authorized by South Dakota statute. Public policy favors requiring a party to abide by his contractual obligations. Public policy also favors the preservation of valuable confidential information and trade secrets. In this case, Simpson agreed that when he left the employ of POET, he would not go to work for an employer in the same business as POET. Nonetheless, Simpson has accepted employment that clearly violates his contractual obligations and places him in a position where he will inevitably use and disclose POET's proprietary information. The public has an interest in seeing that Simpson is required to abide by his contractual commitments pending resolution of this matter. Like the previous factors, this factor weighs in favor of the requested injunction.

III. CONCLUSION

Prior to working for POET, Simpson had no experience or knowledge related to ethanol production. During the course of the last nine years, Simpson has gained invaluable information from POET. As part of his Employment Agreements with POET, Simpson agreed not to disclose confidential information to third parties. He also agreed not to go to

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work for direct competitors in the ethanol industry. Despite his contractual obligations, the ink had barely dried on his resignation letter before it was announced that he was joining the upper management of a direct competitor in this fiercely competitive industry.

Simpson's actions are in direct violation of his Employment Agreement, his NDA, and South Dakota law. His employment with Ethanex represents a serious threat of immediate and irreparable harm to POET.

Accordingly, POET respectfully asks this Court to grant its request for a TRO enjoining Simpson from working for Ethanex and from disclosing or using any of POET's confidential information and trade secrets. POET also asks that the Court allow POET to conduct its requested expedited discovery. POET further asks the Court to schedule a hearing on POET's application for a preliminary injunction while the requested TRO is still in place and that following the hearing the Court enter a preliminary injunction prohibiting Simpson from working for Ethanex and from disclosing or using any of POET's confidential information and trade secrets.

Dated this 23rd day of August, 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of August, 2007, I electronically filed the foregoing Brief in Support of Motion For Preliminary Injunction and Request For Expedited Hearing with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following:

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